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IN THE

SUPREME COURT OF THE UNITED STATES

MAY TERM, 1982

ST. CLAIR GRIFFITH, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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St. Clair Griffith, Jr., by and through his attorney, George G. Newman, P.C., petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, affirming a denial of his Motion under 28 U.S.C. §2255 and Rule 33 seeking a new trial.

QUESTIONS PRESENTED

The Sixth Circuit Court of Appeals held that Petitioner's request for a new trial must fail absent direct proof of misconduct on the part of former DEA Agent Antonucci during the investigation and trial of Petitioner for drug-related activities. (App. A, infra).

Petitioner presented evidence of the government's own findings that Agent Antonucci had committed misconduct, including perjury, in the course of similar and contemporaneous drug-related investigations and court proceedings; and that Agent Antonucci was discharged from the DEA for such misconduct.

The questions presented are:

I.

Whether defense proffered evidence of government findings that wholly discredit the credibility of a paid government agent in similar government proceedings is sufficient to warrant a new trial, when that agent, acting as a key government witness, testifies at trial to material facts?

II.

Alternatively, whether such evidence requires a hearing into the credibility of the government agent at trial?

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OPINION BELOW

The unreported Opinion of the Sixth Circuit Court of Appeals is set forth in Appendix A.

The unreported Opinion of the District Court for the Eastern District of Michigan, which the Sixth Circuit Panel affirmed is set forth in Appendix B.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was filed on March 24, 1982. The jurisdiction of this Court is invoked under 28 USC 1254(1).

STATEMENT OF THE CASE

On November 9, 1977, Petitioner, St. Clair Griffith, Jr., was indicted for possession with intent to distribute a Schedule I and II Controlled Substance in violation of §841(a)(1), Title 21 United States Code. The charges arose from the execution of a search warrant on September 16, 1977 by DEA agents at 24410 Santa Barbara, Southfield, Michigan, where Griffith resided with his wife and four (4) children. The search warrant, based upon allegations of an unnamed informant, contained no mention nor description of petitioner, Griffith.

In a pre-trial suppression hearing, former DEA Agent Louis Antonucci testified that the only information contained in the search warrant affidavit which he (Antonucci) corroborated was the location of the residence, the phone number and identity

of the vehicle used by Griffith. In response to specific inquiries by the trial judge and then defense counsel, as to other information which may have been related by the informant, Antonucci gave the distinct impression that the affidavit fully disclosed his informant's information regarding Petitioner, Griffith. (App. D, infra).

At trial, Griffith presented five (5) witnesses who testified to having regular access to the Santa Barbara address, which was titled in the name of Griffith's father. The only evidence connecting Petitioner, Griffith, to the seized narcotics, apart from circumstances surrounding their presence in the Santa Barbara address, was a single fingerprint found on a plastic baggie containing narcotics. Griffith's defense to this evidence was that the fingerprint was planted by Antonucci.

Griffith testified that during the search, Antonucci directed Griffith's attention to the baggie, asking what it contained. Griffith stated that he picked up the baggie and replied, "I don't know. You tell me." (App. E, infra).

During trial, defense counsel questioned Antonucci about the affidavit supporting the search warrant, seeking to show that the Agent did not have information from an informant directly linking Griffith to narcotics trafficking. Outside the presence of the jury, government counsel contended that such an inquiry would "open the door" to testimony as to whether Antonucci had information that Griffith was in possession or dealing with narcotics. Thereafter, counsel for Petitioner, Griffith, continued his cross-examination and turned Antonucci over to the prosecution for redirect examination. Without any ruling

by the court to the effect that the defense had "opened the door," government counsel elicited the following statement from Antonucci:

> "A. The reliable informant stated that Mr. Griffith was dealing in substantial and large amounts of narcotics from 24410 Santa Barbara."

(App. F, infra).

Petitioner was convicted by a jury on May 30, 1978 and sentenced to a concurrent term of 10 years and fined $20,000. The Sixth Circuit affirmed the conviction on June 15, 1979. A Petition for Certiorari to the United States Supreme Court was denied on October 29, 1979. In December, 1979, Petitioner filed in the District Court a Rule 35 Motion for reduction of sentence and discharge of the fine. In June, 1980 the Rule 35 Motion was combined with a Motion to Vacate Sentence under 28 U.S.C. §2255 and a Motion for a New

Trial under Rule 33 of the Federal Rules of Civil Procedure. On November 18, 1980 in a Memorandum Opinion, District Judge Feikens denied all of Petitioner's Motions. (App. B, infra).

On March 24, 1982, the Sixth Circuit Court of Appeals affirmed the denial of Petitioner's Motion under 28 U.S.C. §2255 and Rule 33 seeking a new trial. (App. A, infra).

Petitioner's motion for a new trial cites evidence of misconduct on the part of Antonucci in drug-related proceedings before 3 judges of the District Court for the Eastern District of Michigan and the discharge of Antonucci from the DEA on August 8, 1980 for misconduct, including perjury. Following is a brief summary of this evidence.

A. United States v Fernando Francis, Cr. 8-80782.

Following suppression proceedings in Francis, Chief District Court Judge, John Feikens, issued an opinion dated March 7, 1979 finding that Antonucci struck and injured the handcuffed Francis without justifiable cause. The court concluded in this regard that, "Antonucci's story is not credible." (App. G, infra). Defendant, Francis, was subsequently tried and convicted for narcotics violations.

As a result of Antonucci's misconduct during the investigation and pre-trial proceedings in Francis, Judge Feikens ordered the DEA to investigate Antonucci's conduct as a government agent.

B. U.S. v. Linwood Stanley, Cr. 79-80546.

Following evasive testimony by Antonucci at a suppression hearing in Stanley, Judge

Avern L. Cohn stated:

> "I don't like, I must tell you right now, straight up, employees of the Federal Government giving answers like 'I don't remember' and 'I don't know' or 'I can't recall.' They are too well trained, too well equipped to give those kinds of answers and expect the Court to believe them."

(App. H, infra).

Though choosing to uphold the warrant in Stanley, Judge Cohn made the following statement at the end of the suppression proceedings:

> "THE COURT:. . . I have to tell you that, I have a short Opinion here that I am not going to give today, that the agent was his own worst enemy. I don't believe him that the point in time in paragraph 5 and the point in time in paragraph 3 are different."

(App. I, infra).

Thereafter, on the eve of trial, the government dismissed all charges against defendant, Stanley.

C. U.S. v. Hatcher, et al. Cr. 79-80090.

In uncontradicted testimony at a suppression hearing on November 16, 1979 before Judge Julian A. Cook, Jr., defendant Hatcher recited acts of intimidation and threats by Antonucci. (App. J, infra).

D. Internal Investigation of Antonucci by DEA.

On August 8, 1980 Antonucci was discharged from the DEA for "Falsification, Misstatement and Concealment of Material Facts in Connection with an Investigation and Other Proper Proceedings" in the Francis case, supra. The internal DEA investigation report contains specific findings of false statements made by Antonucci "in the course of official court proceedings in the case of USA vs Fernando Francis," and in the course of the DEA internal investigation.

ARGUMENT

In Mesarosh v. U.S., 352 U.S. 1 (1956), this Court exercised its supervisory powers and remanded for a new trial following evidence submitted by the government that the credibility of a paid government agent, who testified to material facts against Mesarosh, had been wholly discredited in other similar government proceedings. The Mesarosh court specifically rejected the government's suggested remedy of a hearing into the agent's credibility at the trial of Mesarosh.

Other circuits have applied Mesarosh and remanded for a new trial when the defense has presented evidence of government findings impugning the credibility of a government agent in other similar

proceedings when that agent testified at trial as a key witness.

In the instant case, the Sixth Circuit Court of Appeals failed to follow Mesarosh and the holdings of other circuits in the face of defense proffered evidence of government findings wholly discrediting the credibility of Antonucci in the investigation and prosecution of narcotics offenses. The Sixth Circuit Court of Appeals erroneously held that Petitioner must prove misconduct at trial on the part of Antonucci in order to warrant a new trial.

Alternatively, if the facts of Mesarosh and the decisions of other circuits are found to be sufficiently distinguishable as to not warrant the grant of a new trial herein, Petitioner believes that the Sixth Circuit Court of Appeals erred in not

ordering a hearing into Antonucci's credibility at trial.

A series of modern cases, starting with Mesarosh v. United States, supra, stand for the proposition that a criminal conviction cannot be allowed to stand when based upon testimony of a paid government witness who has given tainted testimony in other similar proceedings. The facts of the present case are strikingly similar to those in Mesarosh, and Petitioner urges this Honorable Court to grant a new trial for the reasons set forth below.

The trial in Mesarosh commenced in February, 1953, and the petitioner was convicted by a jury in August, 1953, for violation of the Smith Act by advocating the overthrow of the government of the United States by force and violence. On September 27, 1956, just two (2) weeks prior to

scheduled oral argument, the Solicitor General filed a motion asking the Supreme Court to remand the case to the district court for a hearing into the credibility at trial of one Mazzei, a paid government informant. The Solicitor General's motion cited several other proceedings, subsequent to petitioner's trial, at which the government either confirmed or strongly suspected that Mazzei testified untruthfully regarding alleged communist party activities, the very issue at petitioner's trial. The government took the position that Mazzei testified truthfully at trial but requested the hearing because, "these [other and subsequent] incidents, taken cumulatively, lead us to suggest that the issue of his truthfulness at the trial of these petitioners should now be determined . . ." Id. at 4, 8. The government's argument was not predicated upon actual charges of perjury

against Mazzei but consisted of the Solicitor General's opinion, expressed at oral argument, that Mazzei had testified untruthfully and the "text of the motion itself [which] shows that the Department of Justice is certain that some of Mazzei's post-trial testimony was contrary to the facts." Id. at 7.

The Supreme Court denied the government's motion for a hearing into Mazzei's credibility and remanded for a new trial stating:

> "Either this Court or the District Court should accept the statements of the Solicitor General as indicating the unreliability of this Government witness. The question of whether his untruthfulness in these other proceedings constituted perjury or was caused by a psychiatric condition can make no material difference here. Whichever explanation might be found to be correct in this regard, Mazzei's credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible. The dignity of the United States Government will not permit the

> conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial." Id. at 9.

352 U.S. at 9.

In remanding for a new trial in Mesarosh, the Court explained that the agent, Mazzei, was not merely a government witness who might have been subject to impeachment. Significantly, the Court found that Mazzei had been a paid government informer for 11 years whose specific government duties involved infiltrating and reporting upon the criminal activities. Moreover, he testified "in that capacity as a government witness." Id. at 10. Finally, the Solicitor General himself raised the issue of Mazzei's credibility at trial because he had testified untruthfully at other proceedings involving the "same

field of activity." Id. [Emphasis Supplied].

In the instant case, Petitioner, and not the government, has proffered evidence of the government's subsequent knowledge of the history of tainted testimony at similar proceedings by its own agent/witness, Antonucci. Petitioner suggests that, to the extent that a finding of untruthfulness by the government is important to the application of Mesarosh, this record meets that test. The factual statement, supra, contains such findings by district court judges and Antonucci was dismissed by the DEA following an internal investigation into his activities as a government agent and witness in drug-related prosecutions.

Antonucci, like Mazzei, was an employee and agent of the United States Government. Similarly, Antonucci's duties involved infiltrating the criminal element with the

responsibility of reporting crimes to the Justice Department. Antonucci [and Mazzei] worked closely with the Justice Department to prepare the government's case against defendants including testifying as to all elements of the crime at trial. The integrity of the prosecution's case depends in significant part upon the truthfulness of the case agent. Indeed, this fact is what prompted the Solicitor General in Mesarosh to come forward with the government's information casting doubt on the veracity of Mazzei. If Mazzei had abused his governmental authority to falsely accuse others, there existed the possibility that a similar prosecution rested on the rotted underpinnings of tainted government testimony.

The Supreme Court reversed and remanded for a new trial in Mesarosh on the basis of the cumulative evidence of a history of

untruthfulness by a government agent acting in the capacity of a case agent. Petitioner herein has submitted ample evidence of a consistent and distasteful history of abuse of governmental authority by Antonucci as a case agent in drug-related prosecutions to warrant a reversal under Mesarosh. Petitioner believes that the Sixth Circuit Court of Appeals erred in not remanding for a new trial consistent with Mesarosh.

In Williams v. United States, 500 F2d 105 (9th Cir. 1974), the Ninth Circuit Court of Appeals addressed a similar case arising from the filing of a §2255 petition. The court held there that the defendant was entitled to a new trial by reason of tainted testimony of a government witness whose perjury arose in another investigation, similar in nature to that described in the petition before it. Defendant, Williams,

proceeded pro se following his conviction, and the affirmation thereof, on 2 counts of selling heroin. Williams claimed that his conviction rested upon the testimony of a government narcotics agent, Watson, who subsequently pleaded guilty to a 12 count indictment charging perjury and conspiracy to deprive another of his civil rights in a similar drug prosecution.

After considering the role that the testimony of the narcotics agent, Watson, played in the instant trial, the court reversed and remanded:

> "A conviction based substantially upon tainted evidence cannot stand. Mesarosh v. United States, supra, 352 U.S. at 14, 77 S.Ct. 1. Watson was the government's agent. He was charged by the government with perjury and convicted of an act perpetrated in an investigation similar in nature and contemporaneous in time to the investigation of Williams."

Id. at 108.

It should be noted that Mazzei was one of 7 witnesses in Mesarosh and the Solicitor General argued that Mazzei's testimony may not have been significant as to some of the petitioners. The Supreme Court rejected this argument finding that Mazzei's testimony was specific and gave "flesh and blood" to the charges. 352 U.S. at 10. Moreover, the court stated that, ". . . in a criminal case, the original finder of fact was a jury. The District Judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzei, to sustain a conviction of any of the petitioners." Id. at 12. For this reason, Petitioner believes that the District Judge below erred in finding the testimony of 2 other DEA agents sufficient to prove the government's case. (App. B). See also, Williams v. U.S., supra, 500 F2d at 107-08.

United States v. Chisum, 436 F2d 645 (9th Cir. 1971), also arose on a motion to vacate a judgment of conviction under 28 U.S.C. §2255. The petitioner in Chisum brought to the attention of the court misconduct on the part of government agents who had testified against him, which misconduct had occurred in other proceedings. Id. at 647. In granting the relief prayed for by petitioner, in his §2255 motion, the Court of Appeals relied heavily upon Mesarosh, but distinguished its instant petition from the background giving rise to Mesarosh:

> "This case differs from Mesarosh in one respect. There, as the Chief Justice emphasized, it was the government which brought Mazzei's perjury to the Court's attention. In our case, it is the defendant who has done so. But what is before us is not the usual case in which a defendant asserts that a witness had perjured himself. Here, it is the government itself that brought the charge against Saiz and

> Downing. And the charge concerns another narcotics case that was being investigated by the same agents at the same time that they were investigating Chisum. Saiz testified against Romero in October, 1966. He testified against Chisum in September, 1967. But the subject matter of his testimony in both cases related to contemporaneous and somewhat similar events.
>
> We hold that Chisum's conviction is as much tainted as was the conviction in Mesarosh.
>
> The order is reversed and the matter is remanded with directions to vacate the judgment of conviction and grant Chisum a new trial." [Emphasis Supplied].

Id. at 648-49.

In United States v. Krasny, 607 F2d (9th Cir. 1979), the defendant was convicted on charges of conspiring to import heroin with intent to distribute, and moved for a new trial based upon newly discovered evidence tending to demonstrate that a government witness (non-agent) had committed perjury at trial. The perjury

was revealed by the government itself, for as the court observed: "Subsequent to Krasny's conviction, the government, with commendable candor, advised his attorney of new developments concerning Worley's trial testimony." Id. at 842.

Finding the record insufficient, the Court declined to apply the more stringent test to the effect that a defendant had to show that acquittal probably would have resulted had the government witness' perjury at trial been known, and vacated and remanded the case so that the District Judge could make specific factual findings as to the perjury of the witness, Worley. Similarly, see Taylor v. Lombard, 606 F2d 371 (2nd Cir. 1979), wherein that Court of Appeals, on a habeas corpus petition from state conviction, determined that the perjury of a government non-agent witness had worked a deprivation of due process

upon the defendant, requiring reversal of his conviction.

Lastly, United States v. Willis, 467 F. Supp. 1111 (W.D. Pa. 1979), arose on remand from the Court of Appeals for evidentiary hearing to assess the materiality of false testimony provided by a key government DEA agent witness. Again, in Willis, while appeal was pending, the government moved for remand on its disclosure of newly discovered evidence of false testimony by the government agents.

At trial, the following test was applied:

> "Our assessment of the materiality of the false testimony depends on the test we apply. This Court is bound by the ruling of our Court of Appeals in United States v. Meyers, 484 F2d 113 (3d Cir. 1973), which said that, when a contention is made that a government witness has testified falsely at trial, the defendant should have a new trial if -- without the false testimony -- the jury might have reached a different conclusion."

Though the trial court held against the defendant in Willis in applying the above stated test, the court nevertheless observed that it was proper for the Trial Judge to "consider the effect on the verdict of the disclosure to the jury of false testimony by key government agents. The record in this case suggests other instances of false testimony and misconduct by the government agents." Id. at 1113.

On appeal, the Third Circuit Court of Appeals noted:

> "The trial court filed findings of fact that Agent Sharpic had testified falsely regarding the surveillance of the drug purchases in question, and had participated in additional misconduct in this and other investigations. These acts of misconduct led to Agents Sharpic and Harvey pleading guilty to falsifying surveillance records and to Harvey's plea of guilty to illegal distribution of heroin." [Emphasis Supplied].

United States v. Willis, 606 F2d 391, 392 (3d Cir. 1969).

The Court went on to hold, in light of Mesarosh and Williams, that:

> "The United States Attorney then filed a motion to remand so that he could move the district court to vacate the conviction and dismiss the indictment 'in the interests of justice.'
>
> We agree that the interests of justice would be better served by a dismissal of the indictment, and commend the United States Attorney for his adherence to the high standard of professional responsibility embodied in his status as a 'representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interests . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Id.

In summary, Petitioner, ST. CLAIR GRIFFITH, JR., believes that the demonstrated misconduct of Antonucci acting as case agent in drug-related prosecutions requires this Honorable Court to enter an Order Vacating Defendant's Conviction.

RELIEF REQUESTED

For the foregoing reasons, Petitioner prays that his Petition for Certiorari be granted.

Respectfully Submitted,
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May 17, 1982

APPENDIX A

ORDER

No. 81-1132
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202

(March 24, 1982)
JOHN P. HEHMAN, Clerk

Re: United States of America,
Plaintiff-Appellee (Respondent)
vs. St. Clair Griffith, Jr.,
Defendant-Appellant (Petitioner)

Before: ENGEL and MARTIN, Circuit Judges; and SPIEGEL, District Judge.*

We have before us petitioner's motion under 28 U.S.C. § 2255 and Rule 33 seeking a new trial because of newly discovered evidence. A direct appeal of his conviction was affirmed by order. United States v. St. Clair Griffith (No. 78-5472, June 15, 1979).

* Honorable S. Arthur Spiegel, United States District Judge for the Southern District of Ohio, sitting by designation.

Petitioner advances three grounds why the motion should be granted. First, the alleged perjurious ways of Drug Enforcement Agent Louis Antonucci. Second, that Agent Antonucci planted his fingerprints on a bag of heroin. Third, he was denied due process because of the government's failure to produce the confidential informant at trial.

We take the last issue first. This court held in the direct appeal there was "no legal error or abuse of discretion in the trial judge's refusal to disclose the name of the informant." The only way that this holding would be subject to attack would be proof that Agent Antonucci committed perjury in this case.

The investigative files of the Drug Enforcement Agency were submitted to the District Court. As Judge Feikens so

carefully pointed out in his opinion below, there was no evidence tendered indicating that Agent Antonucci acted improperly in this case although he was ultimately discharged from the Agency for improper conduct. Without evidence of misconduct by Antonucci in the course of the investigation and trial of petitioner's drug dealing activities all three of St. Clair Griffith's claims must fail.

We affirm the decision of the District Court on the basis of Judge Feikens decision.

Judgment affirmed.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN
Clerk

APPENDIX B

MEMORANDUM OPINION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal No. 77-81027
Civil No. 80-72125

Re: United States of America, Plaintiff vs. St. Clair Griffith, Jr., Defendant

Petitioner, St. Clair Griffith, Jr., was convicted by a jury on May 30, 1978 on two counts of knowingly and unlawfully possessing a Schedule I and II Drug Controlled Substance, in violation of Section 841(a)(1), Title 21, United States Code. He was sentenced on July 20, 1978 to serve a concurrent term of ten years followed by a three-year special parole term and a committed fine totaling $20,000 for both sentences. The U.S. Court of Appeals for the Sixth Circuit

affirmed with an order dated June 15, 1979, and the United States Supreme Court denied certiorari on October 29, 1979.

Petitioner's attorney on appeal, S. Allen Early, Jr., filed a Rule 35 Motion for reduction of sentence in December of 1979. This motion was held in abeyance at the request of petitioner's present attorney, George Newman, upon consultation with Early, pending Newman's completion of a combined motion to vacate sentence under 28 U.S.C. §2255 and motion for new trial under Rule 33 of the Federal Rules of Criminal Procedure. In this opinion I will rule on all motions.

Motion for New Trial

In his 28 U.S.C. §2255 and Rule 33 Motion, petitioner claims he is entitled to a new trial because of newly-discovered evidence of the "perjurious ways" of Drug Enforcement Agency ("DEA") Special Agent Louis Antonucci, who testified as one of the government

witnesses at his trial. Petitioner was specifically referring to an internal investigation by the DEA into alleged misconduct by Agent Antonucci. Petitioner sought discovery of the DEA investigation documents in order to ascertain if there was further evidence to support his claim that his trial was tainted by the testimony of Agent Antonucci. At a hearing on petitioner's discovery motion, Assistant United States Attorney, Frank Zebot, indicated that Agent Antonucci had been terminated from his job with the DEA on August 8, 1980 as a result of the internal investigation. The government agreed to present the DEA files on Agent Antonucci to the Court for an in camera review, and thereafter to provide petitioner with copies of portions relevant to his claim that Antonucci's testimony was "likely perjured" in his trial. Following the production of documents,

petitioner's attorney, George Newman, decided not to file any additional pleadings to supplement his original brief.

Petitioner alleges two instances of misconduct pertaining to his trial. First, that Antonucci's testimony at trial as to what he was told by a confidential informant was perjured, and second, that it is "highly probable" that Antonucci "planted" the petitioner's fingerprint on a bag of heroin.

Although the DEA documents produced pursuant to petitioner's discovery request do not disclose any evidence or findings of misconduct by Agent Antonucci with respect to this trial, petitioner claims that instances of alleged misconduct in subsequent cases sufficiently taints Antonucci's testimony in this case that the conviction cannot be allowed to stand, citing

Mesarosh v. United States, 352 U.S. 1 (1956), and a number of cases from other circuits which are distinguishable from the situation here.

The new evidence proffered by petitioner consists of the following: (1) my opinion in the case of United States v. Fernando Francis, Cr. No. 78-80782, March 7, 1979, in which I found that Antonucci's testimony that defendant Francis was accidentally injured at the time of arrest was not credible, and concluded instead that Antonucci struck the defendant; (2) Judge Avern Cohn's statements during a suppression hearing in United States v. Stanley, Cr. No. 79-80546, that he did not believe Antonucci's explanation of a discrepancy in a DEA report and expressing skepticism as to Antonucci's testimony that he did not keep notes of his contacts with informants,

(Stanley Transcript, March 12-13, 1980, pp. 26-28, 42-43, 47, 99); (3) the testimony of defendant Hatcher in United States v. Hatcher, Cr. No. 79-80090, stating that Agent Antonucci had called him and threatened to have his bond revoked if the defendant refused to cooperate (Hatcher Transcript, October 17, 1979, pp. 99-103); and (4) affidavits from petitioner's wife and mother-in-law that refute Antonucci's testimony at petitioner's bond revocation hearing that petitioner had pistol-whipped his wife after conviction, and an offer of testimony from petitioner that Antonucci called him after trial to solicit his cooperation with the threat that otherwise Antonucci would see that his bond was revoked.

The standard in the U.S. Court of Appeals for the Sixth Circuit for granting a new

trial is set forth in United States v. Garner, 529 F. 2d 962 (6th Cir. 1976), which states:

> To warrant the ordering of a new trial to newly discovered evidence must be not merely cumulative or impeaching in character, but must be such that it would probably produce a different verdict in the event of retrial. United States v. McCoy, 478 F. 2d 846 (4th Cir. 1973). United States v. Kahn, 472 F. 2d 272 (2d Cir.), cert. denied. 411 U.S. 982 93 S. Ct. 2270, 36 L. Ed. 2d 958 (1973). Id. at 969.

See United States v. Solimine, et al, 536 F. 2d 703, 709 (6th Cir. 1976), cert. denied sub nom. Sclafani v. United States, 430 U.S. 918 (1977); United States v. Sposato, 446 F. 2d 779, 781-82 (2d Cir. 1971); United States v. Rodriguez, 437 F. 2d 940 (5th Cir. 1971).

I do not find in this case that the new evidence presented by petitioner, which would serve to impeach rather than directly

contradict Agent Antonucci's testimony at trial, is such that it would probably produce a different result on retrial. There were two other DEA agents who testified about the events surrounding defendant's arrest, so the government did not rely solely on Agent Antonucci's testimony to prove its case. There was ample evidence apart from Agent Antonucci's testimony from which the jury could have concluded that the petitioner was in possession of the heroin and cocaine found in a closet in his home. Furthermore, I cannot infer, as petitioner suggests, that Antonucci "planted" petitioner's fingerprint on the bag of heroin merely because of instances of different misconduct found or alleged in other cases. Petitioner's own testimony is that Antonucci did not touch the bag in his presence but merely asked petitioner, "What

is it?" (Transcript, pp. 98-99, May 22, 1978). Consequently, petitioner's motion for new trial pursuant to Rule 33 is denied.

§2255 Motion

Petitioner also claims in his 28 U.S.C. §2255 motion that he was denied due process because of the government's failure to produce the confidential informant whose hearsay testimony was used in trial.

A similar claim that petitioner was denied his Sixth Amendment right to confront an adverse witness and effective assistance of counsel because of the failure to request disclosure of the informant was raised on direct appeal and denied. The U.S. Court of Appeals for the Sixth Circuit found "no legal error or abuse of discretion in the trial judge's refusal to disclose the name of the informant." Order, June 15, 1979, United States v. St. Clair Griffith, No. 78-5472. I find no basis in petitioner's

present motion for ruling otherwise.

The cases cited by petitioner do not establish an absolute right to have the identity of an informant disclosed. As the court stated in United States v. Bower, 575 F. 2d 499, 503 (5th Cir. 1978), cited by petitioner, there is no "fixed rule" to guide a decision on a motion to compel disclosure of a confidential informant. Although courts generally have required the government to identify an informant who was present during the commission of the crime, that generality does not apply to an informer, as in this case, whose only role is providing the tip which establishes probable cause for a search warrant. "[I]n each case the court must balance the benefits to the defendant of disclosure against the resulting harm to the government." Id. at 503, citing Roviaro v. United States, 353 U.S. 53 (1957). Although it could be found

a denial of due process if facts disclosed that a defendant did not receive a fair trial because of the absence of an informant, such is not the case here.

The hearsay statement of the informant to which petitioner objects occurred after the following sequence of events. Defense counsel, Clifford Williams, sought to introduce the search warrant affidavit during cross-examination of Agent Antonucci. I excused the jury to question counsel as to the purpose of his inquiry; he indicated it was to show the jury that Agent Antonucci had no information implicating petitioner at that point. Government counsel requested that, if defense counsel questioned the affidavit's reference to a residence and not the defendant, Agent Antonucci be permitted to tell whether he had other information that the defendant was in possession of narcotics. I then stated that if defense

counsel "open[ed] the door", government counsel would have an opportunity to respond. (Transcript, May 18, o978, pp. 52-53). Thus, following the conclusion of defense counsel's cross-examination regarding the affidavit, government counsel inquired whether the agent had additional information about the defendant not contained in the search warrant, to which Agent Antonucci replied, "[T]he reliable informant stated that Mr. Griffith was dealing in substantial and large amounts of narcotics from 24410 Santa Barbara." (Transcript, May 18, 1978, pp. 106-107). Defense counsel did not object to that statement nor request disclosure of the informant's identity.

The government did not rely solely on the hearsay statement of the informant to prove its case; rather, that information was

elicited in response to subject matter raised by defense counsel in an attempt to rehabilitate the testimony of Agent Antonucci. Cf. United States v. Attaway, 449 F. 2d 309, 311 (5th Cir. 1971). There was substantial other evidence upon which the jury could have based its findings of guilt. Furthermore, petitioner's defense was not solely dependent on the availability of the informant. Petitioner presented the testimony of five witnesses saying they had access to petitioner's residence to support his argument that others could have been in possession of the narcotics found in his home.

In light of the facts of this case, I do not find that the failure to produce the informant at trial constituted a denial of the defendant's right to due process of law.

Petitioner also claims I denied him due process by permitting Antonucci to testify

about what the informant told him without ruling that a knowing waiver of petitioner's right to confrontation had occurred. Having found no due process right to disclosure of the informant's identity under the facts of this case, the question of whether there was a knowing waiver of the right to confrontation is irrelevant. Furthermore, the case petitioner cites in support of this argument, United States v. Stephens, 609 F. 2d 230 (5th Cir. 1970), concerns the limits on an attorney's ability to waive his or her client Sixth Amendment right to confrontation by stipulating to the admission of evidence, and is inapposite here.

Petitioner's final argument for vacating sentence, that he was denied due process because of Antonucci's likely perjured testimony regarding evidence of other crimes, is without merit. Petitioner does not point to,

nor does my review of the record reveal, any testimony of Antonucci at trial referring to other crimes committed by petitioner.

Rule 35 Motion

In his Rule 35 motion, petitioner seeks a reduction of his sentence and discharge of his committed fine. No adequate grounds have been advanced by petitioner to warrant a reduction of his sentence. It would be neither fair nor just for me to do so.

Petitioner's request to have his committed fine discharged should in the first instance be addressed to the Warden of the Milan Federal Correctional Institution where petitioner is currently incarcerated. The Warden is authorized to determine whether petitioner is indigent and to administer the pauper's oath. Petitioner may thereafter make application for disposition to the United States Magistrate in the District

where he is in custody if he is found by the Warden not to be indigent. 18 U.S.C. §3569. Petitioner should request the appropriate forms from his case worker. Hence, petitioner's motion to discharge the committed fine is dismissed without prejudice.

An appropriate order is entered herewith.

John Feikens
Chief United States
District Judge

November 18, 1980

APPENDIX C

ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTNERN DIVISION

Criminal No. 77-81027
Civil No. 80-72125

Re: United States of America, Plaintiff vs. St. Clair Griffith, Jr., Defendant

In accordance with the accompanying opinion and for the reasons set forth therein,

IT IS ORDERED that petitioner's Rule 33 motion for a new trial, his 28 U.S.C. §2255 motion to vacate sentence, and his Rule 35 motion to reduce sentence be, and hereby, are DENIED; and

IT IS FURTHER ORDERED that petitioner's motion to discharge the committed fine be, and hereby is, DISMISSED, without prejudice.

John Feikens
Chief United States
District Judge

November 18, 1980

APPENDIX D

U.S. v. St. Clair Griffith, Jr., Excerpt of Suppression Proceedings, February 23, 1978, at p.14:

THE COURT: What is the question?

Q (By Mr. Williams): The question is: What more specific information, if you had any and if you had any more specific information, why didn't you put it in the search warrant affidavit?

THE COURT: Take the first question for Mr. Antonucci. Did you have any more information that you have not already testified to?

THE WITNESS: No, I haven't, Your Honor.[1/]

1/The specific context of this inquiry related to Antonucci's observations inside the residence at 34410 Santa Barbara.

U.S. v. St. Clair Griffith, Jr., Excerpt of Suppression Proceedings, February 23, 1978, at pp.23-24:

Q [By Mr. Williams] Now, at the time that you executed the affidavit and took the information before the Magistrate Komives, had you corroborated any of the information that the anonymous informant had given you at that point in time?

A What information are you trying to -- what information exactly?

Q Any information that you have listed in this affidavit.

A Corroborated the residence where the individual lived. The residence was described to me. Of course, I got that information from the search warrant. All the other information is specifically explanatory as far as the informant.

Q I'm not worried about whether it's specifically explanatory. I want to know that when you went before Magistrate Komoves on the 15th of September, 1977, had you corroborated anything other than the address of these premises, the description of the house or anything like that which you said you had already done? Had you corroborated anything about any possible heroin being on the premises through any other independent agent or anything like that? Did you attempt to corroborate any of the information other than in the affidavit other than the address and premises?

A You're talking about the premises?

Q I'm --

A You're being very general. Ask me the specific question.

THE COURT: Let me get into it. What did you corroborate, if anything, before you went to Magistrate Komoves?

THE WITNESS: The residence, where the residence was located. The telephone number, I ran through utilities. At the residence, the vehicle that was being utilized by the Defendant. As far as me corroborating the narcotics in the residence, that would be impossible. I haven't been in there, which I wasn't. The pistol -- individual who described the pistol did not know the make or the model. It was a number of pistols seized from that residence.

APPENDIX E

U.S. v. St. Clair Griffith, Jr., Excerpt of Trial Testimony, May 22, 1978 at pp. 98-99:

Q [By Mr. Williams] Now, going back to that kitchen.

When Agent Antonucci brought you into the kitchen, did you see anything else on the table at that time?

A No, not that I can recall. There was a lot of stuff around. He directed his attention to that bag similar to which you showed me but it wasn't dirty like that.

Q All right.

A And it had some brown stuff you are taling about.

Q In other words, how did he describe the bag? Did Agent Antonucci pick the bag up?

A No, he didn't.

Q Did he touch it in your presence?

A Not in my presence, no.

Q But you touched it one time?

A Yes, I did. He asked me, "What is it?"

Q What did you say?

A I examined it, more or less, and I said, "I don't know. You tell me."

APPENDIX F

U.S. v. St. Clair Griffith, Jr., Excerpt of Trial Testimony, May 18, 1978, at pp. 106-107:

Q [By Ms. Toensing] And is there any requirement when you get a search warrant for a house that you have information in that affidavit about the person?

A No, there is not.

Q In this particular situation, Agent Antonucci, did the confidential informant also give you information about St. Clair Griffith that you did not put in the affidavit?

A Yes.

Q What was that?

A That the individual did live there, that he drove a Cadillac

that I observed on a number of occasions parked in front of the residence; that he lived there with his wife and children.

Q Did the informant give you any information about narcotics and Mr. St. Clair Griffith?

A Yes.

Q What was that?

A The reliable informant stated that Mr. Griffith was dealing in substantial and large amounts of narcotics from 24410 Santa Barbara.

Q And that confidential informant specifically stated it was St. Clair Griffith. Is that correct?

A That is correct.

MS. TOENSING: No further questions.

APPENDIX G

United States v. Fernando Francis, Cr. 8-80782, Excerpt of Opinion of the Honorable John Feikens, dated March 7, 1979, at p.3:

> "The agents then conducted a thorough search of the barber-shop and discovered a quantity of heroin located inside a wall, in addition to some marijuana found near Thompson in the furnace room. While this was going on Francis said Antonucci placed him, still handcuffed, in a barber's chair and struck him in the face with a nearby golf club. (Francis sustained fairly serious injuries at some point during the evening which he substantiated with hospital treatment records. (Defendant's Exhibit A)).

Antonucci told a different story. He claimed that Francis sustained his face injuries when he was struck in the face by the heavy outer gate when it swung open upon entry. However, Agent Crep, who was with Antonucci when they entered the front door, saw none of this. Nor were the two agents able to explain how, with the two of them in the way, the gate could have swung with sufficient force to hit Francis in the face. From their description of the event, Francis would have had to perform with extraordinary agility only to place himself directly in the path of a swinging gate. Antonucci's story is not credible. More credible

is Francis' version. Though I doubt that he was struck with a golf club, I find that Antonucci struck him while the barbershop was being searched, without justifiable cause, resulting in at least some of the injuries for which Francis was later treated.

APPENDIX H

U.S. v. Linwood Stanley, Cr. 79-80546, Excerpt of Suppression Proceedings, March 12, 1980, at pp. 26-28:

Q You are telling us that you have no recollection or no notes that would refresh your recollection as to what you paid [the informant]?

A I don't keep notes on what I paid. That's kept in a log in a safe which means you would have to go through a Regional Director to look at it or the special agent in charge.

THE COURT: Let me ask you a question, sir, you knew you were coming here today for an Evidentiary Hearing, didn't you?

A Yes.

THE COURT: You knew you were going to be asked these questions, didn't you?

Have you been through these Hearings before?

A Yes, many times.

THE COURT: Have you been asked before how much you paid an informant?

A Yes.

THE COURT: And you are telling me you didn't have that information in advance, you weren't prepared to answer the questions so we would have to recess, he would want to know and you would have to back and go to a supervisor and into a locked safe to find out?

A I just didn't think it would be that important.

THE COURT: I don't really understand, this is my first Evidentiary Hearing of this kind,

Mr. Cranmer, and I don't understand an agent saying he didn't think that would be that important. How many other questions is he going to be asked that he doesn't have the information on and we will have to recess to find out?

MR. CRANMER: Your Honor, I didn't think, quite frankly, that it would come up in this Evidentiary Hearing. I don't see how that goes to the Motion that has been brought by Mr. Rice with respect to any material mis-statements that have been made in the Affidavit.

THE COURT: I understand that, sir, but I am new at this business, as you know, and it would seem to me that someone would want

to know if he, she, it was paid 5, 50, 500, 5,000, and you, as an assistant attorney would have that information going in. If this Hearing goes over until tomorrow, which it looks like it will, then I would expect that you would have all of the relevant circumstances available, that doesn't say that he is going to have to give them, but at least if the question is asked and the objection is overruled then the question can be answered.

I don't like, I must tell you right now, straight up, employees of the Federal Government giving answers like "I don't remember" and "I don't know" or "I can't recall." They are too well trained, too well equipped to give those kinds of answers and expect the Court to believe them.

APPENDIX I

U.S. v. Linwood Stanley, Cr. 79-80546, Excerpt of Suppression Proceedings, March 13, 1980, at pp. 99-101:

[THE COURT] . . . I have to tell you that, I have a short Opinion here that I am not going to give today, that the agent was his own worst enemy. I don't believe him that the point in time in Paragraph 5 and the point in time in Paragraph 3 are different. When I read the other Affidavits I am even more convinced, because it appears that the pattern of the Affidavit, which may be quite legitimate, is to describe at one point the informant seeing the substance, and then at the second point a description of texture and color, and I believe

that the word brown got into Paragraph 5 inadvertently, sloppily, if you will, and that happens in Judge's Opinions, it happens in Briefs, it happens in pleadings, we mis-speak ourselves and put in an extra word and don't catch the possible inconsistency.

I am prepared to accept the fact that in the words of U.S. v. Luna, it may have been a good faith error that the word brown got in there.

But I have to tell you, in light of the agent's testimony and persistence in maintaining that these were a month apart which, again, is a human characteristic not to admit a mistake, but to hang in there and try and justify it, which only digs the hole, as you saw, deeper.

You may bear some of the responsibility because you may have overlooked it. I haven't asked you.

MR. CRANMER: Right.

THE COURT: I said at the end, someone was either sloppy or you overlooked it which is, again, human.

I think under the circumstances, because the Court is unhappy with the agent and I will tell you, Mr. Rice, I don't think it goes to the merits of the Affidavit, because I was prepared today to uphold the Affidavit and dismiss all your Motions on the grounds that you had not made out a case, and the likelihood is you have not made out a case. But if this agent is under a cloud, which

Mr. Rice represents to the Court he is, and I don't know whether that is a fact or not.

MR. RICE: He is.

THE COURT: I am not asking. I am not asking. He makes that representation. I am not going to try this case today or tomorrow or next week, and I will have to decide this before the case comes to trial.

MR. CRANMER: Yes, sir.

THE COURT: It seems to me that it is not unreasonable for me to make inquiry of the Chief Judge of the status of this since he apparently has control of it, and to see from him whether a Judge in this District, who has a case on its docket, and has a Motion on its docket and has a matter to dispose

of, where the credibility of the agent is a factor because the Affidavit was issued under the oath of the Agent, which I think you would agree.

MR. CRANMER: I would.

APPENDIX J

U.S. v. Hatcher, et al., Cr. 79-80090, Excerpt of Suppression Proceedings, October 17, 1979, at pp. 99-101, 103:

Q When was the next time that you heard from Mr. Antonucci?

A When he called me on the phone.

Q What was the first thing he said to you?

A He said, "Hi, I thought you were going to cooperate with us."

Q That was the very first thing he said?

A No, the very first thing, I'm not saying word for word, I'm telling you how it started, you know. That's been six or seven months ago.

Q I understand that.

A So I'm just telling you more like in details of what happened. He asked me about cooperating.

Q Mr. Hatcher, if I can just stop you right there. I'm interested in what subjects he brought up first.

A Cooperating.

Q That was the first subject?

A Yes.

Q You're concern about that?

A I'm definite about that.

Q What was Mr. Antonucci's tone of voice when he was speaking to you?

A I told him to see my attorney and he sounded like he was disgusted, and that's when he brought up about I had threatened a witness.

Q Did he appear initially when you talked to him, did he appear to be angry or upset at all?

A No.

Q It was just what you would call a normal conversation, normal tone?

A Uh-huh.

Q And what was the next thing that Agent Antonucci said to you?

A Well, I told him to see my attorney, to talk with him, and he told me my attorney was inexperienced and excused --

Q Mr. Hatcher, if I can stop you right there. Did he use that word? Did he say that your attorney was inexperienced?

A He said your attorney is going to mess you up. He really said an asshole, excuse me.

Q That was the word he used?

A Yes.

Q And you're certain about that?

A Yeah, I'm certain about it.

Q And what else did he say?

A He said this is the first case that my attorney has, and he didn't know what he was doing. He never had a drug case before.

Q And were those his words?

Q That was his words.

Q And what else did he say?

A He said he was going to me messed up, and then he said if I threatened a witness he would have to have me taken off bond, get my bond taken away from me.

* * * * *

Q Did Agent Antonucci indicate to you that he personally could have your bond taken away from you, or did he say that -- let me finish -- or did he indicate that he would come to an Assistant United States Attorney

and indicate to him that you had been threatening a witness?

A No, he didn't say a United States Attorney. He led me to believe that he had jurisdiction over taking it.

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FILED
JUL 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2161

In the Supreme Court of the United States

OCTOBER TERM, 1982

ST. CLAIR GRIFFITH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly denied petitioner's motion for a new trial based on newly discovered evidence that a government agent at trial had subsequently been discharged for false testimony and misconduct in unrelated proceedings.

2. Whether the district court properly failed to conduct a hearing into the credibility of a government witness.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 31-33) is not reported. The memorandum opinion of the district court denying petitioner's motions for a new trial and for vacation or reduction of the sentence (Pet. App. 34-50), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1982. The petition for a writ of certiorari was filed on Monday, May 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of knowingly possessing Schedule I and II controlled substances, in violation of 21 U.S.C. 841(a)(1). He was

sentenced to concurrent terms of ten years' imprisonment on each of two counts, to be followed by a three-year special parole term, and was fined $20,000 (Pet. App. 34). The court of appeals affirmed, and this Court denied certiorari. *United States* v. *Griffith*, 601 F. 2d 591 (6th Cir.), cert. denied, 444 U.S. 931 (1979).

In December 1979 petitioner filed a motion for reduction of sentence under Fed. R. Crim. P. 35. In June 1980 the Rule 35 motion was combined with a motion to vacate sentence under 28 U.S.C. 2255 and a new trial motion (Fed. R. Crim. P. 33; Pet. App. 35). The district court denied all the motions (Pet. App. 34-50) and the court of appeals affirmed (Pet. App. 31-33).

1. The evidence adduced at trial established that on September 16, 1977, agents of the Drug Enforcement Administration (DEA) searched petitioner's residence pursuant to a warrant based on information furnished by a confidential informant. Approximately 123 grams of heroin, two grams of cocaine, 1700 grams of manitol, six loaded guns and $20,780 in cash were seized from the premises (May 17-18 Tr. 28-35, 121-122, 212-216; May 19 Tr. 114). Petitioner's fingerprint was found on a plastic bag containing heroin, although he claimed that it was "planted" there by Louis Antonucci, a DEA agent who participated in the search (Pet. 6-7). At the time of the search, petitioner, his wife and his four children were the only persons present at the residence (May 17-18 Tr. 25, 118; May 19 Tr. 21).

Louis Antonucci was one of three DEA agents who testified at trial about the events surrounding petitioner's arrest and the seizure of evidence at his residence (Pet. App. 41). Petitioner's counsel cross-examined these witnesses at length and attempted to discredit their testimony in closing argument. See, *e.g.*, May 17 Tr. 49-112, 134-179; May 19 Tr. 29-46; May 23 Tr. 164-170.

2. Several months after petitioner's trial, Agent Antonucci testified in the unrelated narcotics case of *United States* v. *Francis*, Cr. No. 78-80782 (E.D. Mich., Mar. 7, 1979), before the same district judge (Judge Feikens) who had presided at petitioner's trial. In that case the court found "that Antonucci's testimony that defendant Francis was accidentally injured at the time of arrest was not credible, and concluded instead that Antonucci struck the defendant" (Pet. App. 38, 59-61; I C.A. App. 90-95).[1] Thereafter, Antonucci testified at a suppression hearing in *United States* v. *Stanley*, Cr. No. 79-80546 (E.D. Mich., Mar. 12, 1980), another proceeding unrelated to petitioner's case. During the hearing, District Judge Avern Cohn commented that he did not believe Antonucci's explanation of a discrepancy in a DEA report and was skeptical about Antonucci's testimony that he did not keep notes of his contacts with informants (Pet. App. 38, 62-70; I C.A. App. 96-113).[2]

Agent Antonucci's employment with DEA was terminated on August 8, 1980, following an internal agency investigation (Pet. App. 36). A report on the results of that investigation cited "false statements, misstatements and concealment of material facts" in the case of *United States*

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[1]"C.A. App." refers to the appendix in the court of appeals.

[2]Petitioner alleged two additional acts of misconduct, based upon (1) the testimony of the defendant in the unrelated case of *United States* v. *Hatcher*, Cr. No. 79-80090 (E.D. Mich., Oct. 17, 1979 Suppression Hearing), that Antonucci called him and threatened to have his bond revoked if he failed to cooperate; and (2) affidavits of petitioner's wife and mother-in-law that refute Antonucci's testimony at petitioner's bond revocation hearing that petitioner had pistol-whipped his wife after conviction, and an offer of testimony from petitioner that Antonucci called him after trial and threatened to have his bond revoked if he did not cooperate (Pet. 12; Pet. App. 39; 71-75; I C.A. App. 86-89).

v. *Francis, supra*, and in the internal investigation in connection with the *Francis* case, as a reason for termination (II C.A. App. 3).[3] The report does not disclose any evidence or findings of misconduct by Antonucci in the investigation or trial of petitioner (Pet. App. 37; II C.A. App. 1-3). Petitioner's motion for a new trial was based on the subsequent criticism of Antonucci's conduct in these other cases.

3. In its memorandum opinion and order denying petitioner's motions, the district court concluded that the proffered evidence of Antonucci's misconduct and false statements in unrelated proceedings was merely impeaching and was not such that it would probably produce a different result on retrial (Pet. App. 40-42):

> I do not find in this case that the new evidence presented by petitioner, which would serve to impeach rather than directly contradict Agent Antonucci's testimony at trial, is such that it would probably produce a different result on retrial. There were two other DEA agents who testified about the events surrounding [petitioner's] arrest, so the government did not rely solely on Agent Antonucci's testimony to prove its case. There was ample evidence apart from Agent Antonucci's testimony from which the jury could have concluded that the petitioner was in possession of the heroin and cocaine found in a closet in his home. * * * Consequently, petitioner's motion for a new trial pursuant to Rule 33 is denied.

The court of appeals affirmed (Pet. App. 31-33).

---

[3]The government provided the DEA files on Louis Antonucci to the district court for *in camera* review, and thereafter provided petitioner with copies of portions of the file relevant to his claim that Antonucci's testimony was "likely perjured" (Pet. App. 36).

ARGUMENT

Petitioner contends (Pet. 2-3, 13-14) that instances of alleged misconduct in subsequent cases sufficiently "taint" Antonucci's testimony in this case that a new trial is required. Alternatively, petitioner argues (Pet. 2-3, 14-15) that even if a new trial were not required, the district court erred in not holding a hearing into Antonucci's credibility. These fact-laden contentions do not warrant review by this Court.

1. Petitioner relies heavily on this Court's opinion in *Mesarosh* v. *United States*, 352 U.S. 1 (1956). The decision in *Mesarosh*, however, depended on a unique set of facts not present here. It has not been extended, and should not be, to circumstances like those of this case.

Mesarosh involved a Smith Act conspiracy to advocate the overthrow of the United States government by force and violence. At trial a government informant testified about the activities of members of the American Communist Party in connection with the conspiracy. 352 U.S. at 3-4, 10. On direct review by this Court, the Solicitor General brought to the Court's attention, shortly before oral argument, the informant's untruthful testimony in other proceedings regarding the activities of the American Communist Party. The false testimony occurred before a Committee of the United States Senate during the same period as the informant's testimony at petitioner's trial, and at subsequent proceedings before the Senate and before a Florida Circuit Court. *Id.* at 4-7. In addition to providing false testimony about the activities of the American Communist Party, the informant testified falsely about his own arrest and conviction record. *Id.* at 5-7.

The Solicitor General conceded that the informant's testimony at petitioners' trial, although not known to be false,

was essential to the convictions of at least two of the petitioners. The United States therefore moved the Court to remand for a hearing on the credibility of the informant. 352 U.S. at 3, 8. The Court declined to remand for a hearing, concluding that the informant's credibility had been "wholly discredited by the disclosures of the Solicitor General" and that this was not a case where "the District Court, on a remand could make an unassailable finding that [the informant's] other falsehoods were differentiated from his testimony herein." *Id.* at 9, 13. On this basis, the Court held that a new trial was required.

Mesarosh did not, however, establish a per se rule mandating reversal or a new trial where the credibility of subsequent testimony in unrelated cases is relied upon to challenge a conviction. Indeed, the Court expressly observed (352 U.S. at 9; footnote omitted):

> It must be remembered that we are not dealing here with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, presenting untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. Such an allegation by the defense ordinarily will not support a motion for a new trial, because new evidence which is "merely cumulative or impeaching" is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial.

The present case is, accordingly, not controlled by *Mesarosh*. It is, in fact, precisely the situation this Court distinguished from the facts presented in *Mesarosh*—a defense allegation that newly discovered impeaching evidence requires a new trial. Here, the district court explicitly found, and the record shows, that ample evidence apart from Antonucci's testimony supports the jury's verdict.

Moreover, the district court in the present case was in a unique position to differentiate Antonucci's other testimony from his testimony at petitioner's trial: the same judge who ruled on the motion had presided both at petitioner's trial and at the trial in *United States* v. *Francis*, *supra*, where Antonucci gave the testimony for which his employment was subsequently terminated. Accordingly, the district court's findings are entitled to considerable weight. *United States* v. *Hamilton*, 559 F. 2d 1370, 1373-1374 (5th Cir. 1977). It is clear from his opinion (Pet. App. 34-42) that Judge Feikens thoroughly reviewed the record in these proceedings, as well as other evidence presented in support of the motion. It is, of course, proper for the trial judge to utilize the knowledge he gained from the trial as well as the showing made on the motion in considering whether a new trial is warranted. *United States* v. *Johnson*, 327 U.S. 106, 112 (1946). Thus, the district court here could and did distinguish Antonucci's testimony at other proceedings from his testimony at petitioner's trial. The court of appeals correctly affirmed the denial of petitioner's motions, and this fact-bound result does not warrant review by this Court. *United States* v. *Hamilton*, *supra*, 559 F. 2d at 1373.

Other cases relied upon by petitioner are equally distinguishable. In both *Williams* v. *United States*, 500 F. 2d 105 (9th Cir. 1974), and *United States* v. *Chisum*, 436 F. 2d 645 (9th Cir. 1971), the Ninth Circuit was faced with a conviction substantially based upon the testimony of an agent who was later indicted or convicted of perjury in contemporaneous and similar proceedings. *Williams* v. *United States*, *supra*, 500 F. 2d at 107-108; *United States* v. *Chisum*, *supra*, 436 F. 2d at 646-648.[4] Petitioner's conviction in the

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[4]Petitioner's reliance on *United States* v. *Willis*, 467 F. Supp. 1111 (W.D. Pa.), aff'd, 606 F. 2d 391 (3d Cir. 1979), is similarly misplaced. There the district court found that two of three surveillance agents had

present case is not based substantially upon Antonucci's testimony. The district court concluded, and the evidence shows, that the conviction was based in large part on the testimony of others and that the result would probably not be different on retrial simply because Antonucci's credibility would now be seen to be more suspect.

Moreover, petitioner failed to demonstrate that the evidence of Antonucci's alleged subsequent misconduct was more than merely impeaching.[5] As the Ninth Circuit has

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testified falsely about material issues at the defendant's trial. Those agents subsequently pleaded guilty to falsifying surveillance records used to convict the defendant. In the present case, petitioner can offer only allegations of false statements in unrelated proceedings.

In *United States* v. *Krasny*, 607 F. 2d 840 (9th Cir. 1979), cert. denied, 445 U.S. 942 (1980), the issue before the court was whether a new trial was required where the government presented material testimony that it later conceded was probably false. Significantly, the court of appeals concluded that the district judge was competent to determine whether the evidence of false testimony would probably produce a different result on retrial. Since the district court record was insufficient to allow the court of appeals to determine whether this had been done, the case was remanded for the necessary findings. 607 F. 2d at 846. The present case involves neither alleged perjury in the trial itself nor an inadequate record.

[5]In order to prevail on a Rule 33 motion a defendant must establish, *inter alia*, that the new evidence is not merely cumulative or impeaching, that the evidence is material to the principal issues involved, and that the evidence is of such a nature that it would probably produce an acquittal on retrial. *United States* v. *Brashier*, 548 F. 2d 1315, 1327 (9th Cir. 1976), cert. denied, 429 U.S. 1111 (1977); *United States* v. *Garner*, 529 F. 2d 962, 969 (6th Cir.), cert. denied, 426 U.S. 922 (1976); *United States* v. *Schwarzbaum*, 527 F. 2d 249, 254-255 (2d Cir. 1975), cert. denied, 424 U.S. 942 (1976). The district court correctly concluded that petitioner did not satisfy these requirements, and this determination must be upheld absent an abuse of discretion. *United States* v. *Wallace*, 578 F. 2d 735, 742 (8th Cir.), cert. denied, 439 U.S. 898 (1978); *United States* v. *Hamilton*, *supra*, 559 F. 2d at 1373. The court of appeals concluded that there was no abuse of discretion, and that conclusion is adequately supported.

stated, "[e]vidence which may impeach a government witness, although discovered after trial, is not enough without a greater showing that a new trial is required * * *." *United States* v. *Brashier*, 548 F. 2d 1315, 1327 (1976), cert. denied, 429 U.S. 1111 (1977). See also *United States* v. *Hirst*, 668 F. 2d 1180, 1185 (11th Cir. 1982); *United States* v. *Gilbert*, 668 F. 2d 94, 96 (2d Cir. 1981); *United States* v. *Martorano*, 663 F. 2d 1113, 1119-1120 (1st Cir. 1981); *United States* v. *Librach*, 609 F. 2d 919, 921-922 (8th Cir. 1979). The district court here concluded (Pet. App. 40-41) on the basis of the proffered evidence and the trial record that the new evidence presented by petitioner "would serve to impeach rather than directly contradict Agent Antonucci's testimony at trial * * *."

Petitioner also failed to demonstrate that the evidence of Antonucci's alleged subsequent misconduct "would probably produce an acquittal" on retrial, an equally well-settled requisite to the granting of a Rule 33 motion based on new evidence. *United States* v. *Brashier, supra*, 548 F. 2d at 1327; *United States* v. *Stofsky*, 527 F. 2d 237, 246-247 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976). Here again, the district court made detailed findings and concluded (Pet. App. 34-42) that it could not find that petitioner's proffered evidence "would probably produce a different result on retrial" (*id.* at 41).

Thus, "[t]his case is controlled by the fact that evidence not under attack amply sustains the convictions." *United States* v. *Hamilton, supra*, 559 F. 2d at 1373. Moreover, in the absence of the specific, identifiable taint present in *Mesarosh* and the other decisions upon which petitioner relies, the rule he proposes would lead, whenever an officer is disciplined or gives testimony found not credible in another case, to new trials for defendants in all cases in which that officer had testified. Neither *Mesarosh* nor any

other decision calls for the imposition of such harsh sanctions on the government in cases of new evidence of relevance as remote as in this case.

? Recognizing that the cases upon which he relies may sufficiently distinguishable as to not warrant the grant of a new trial" (Pet. 14), petitioner raises the alternative argument that the district court erred in not ordering an evidentiary hearing on his new trial claim.[6]

The decision whether to hold an evidentiary hearing was addressed to the sound discretion of the district court. Such claims are generally decided on the basis of the trial record and affidavits alone. *United States* v. *Hamilton, supra*, 559 F. 2d at 1373; *United States* v. *Scott*, 521 F. 2d 1188, 1195-1196 (9th Cir. 1975), cert. denied, 424 U.S. 955 (1976); *United States* v. *Henson*, 486 F. 2d 1292, 1300 n.7 (D.C. Cir. 1973); *Gurleski* v. *United States*, 405 F. 2d 253, 267 (5th Cir. 1968), cert. denied, 395 U.S. 977 (1969); see also 28 U.S.C. 2255, Rule 8(a).[7] A trial judge who has presided over

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[6]It may be inferred from petitioner's "offer of testimony" before the district court (Pet. App. 39) that a request for an evidentiary hearing was addressed to that forum. It does not appear, however, from petitioner's brief to the court of appeals that he raised the issue there of error in failing to conduct such a hearing. Absent exceptional circumstances, not present here, arguments which were not raised below will not be reviewed by this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

[7]Indeed, the district court went beyond what was required of it under the federal rules, by providing petitioner with collateral discovery of relevant portions of Antonucci's DEA personnel file and by considering this and other evidence before ruling on the motion. The only evidence petitioner indicated he would offer at an evidentiary hearing, beyond that which the district court already had before it, was his own testimony that Antonucci called him after trial to solicit his cooperation with a threat that otherwise he would have his bond revoked (Pet. App. 39). In these circumstances, petitioner cannot be heard to complain that

the full course of the proceedings and, in this case, in collateral proceedings called into question, is particularly well qualified to rule without conducting an evidentiary hearing. *United States* v. *Hamilton, supra*, 559 F. 2d at 1373-1374. Hence, the district court did not abuse its discretion in disposing of the motions on the record before it without an evidentiary hearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the district court abused its discretion in not holding a hearing regarding this allegation, which even if true would not have added greatly to the strength of petitioner's request for a new trial.

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